U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUTH C. FREEDMAN-VAUGHN and DEPARTMENT OF HEALTH & HUMAN SERVICES, INDIAN HEALTH SERVICES & HOSPITALS, PUBLIC HEALTH SERVICE INDIAN HOSPITAL, Pine Ridge, SD

Docket No. 00-2203; Submitted on the Record;
Issued May 16, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's May 24, 1999 request for reconsideration; and (2) whether the Office properly denied appellant's February 21, 2000 request for reconsideration.

On February 9, 1995 appellant, then a 49-year-old medical records administrator, sustained a temporomandibular joint injury, left hip strain and dislocation, lumbar strain, cervical sprain with subluxation, a dislocated left hip, a mild cervical disc bulge and post-traumatic stress disorder resulting from a motor vehicle accident. She was off work from February 10 to March 27, 1995, when she returned to work four hours per day. Appellant again stopped work on August 10, 1995 and did not return.[1] Her case was placed on the daily compensation rolls.

In an August 23, 1995 report, Dr. J.D. Sabow, an attending neurologist, provided a history of injury and treatment and diagnosed "a soft tissue injury, probably a little trochanteric bursitis on the left," a "shoulder syndrome" and cervical muscle spasms.[2]

Dr. Jerry Allen Tankersley, an attending chiropractor, submitted reports dating from December 1995 through August 1997, diagnosing a "recurrent subluxation syndrome" of the cervical and lumbar spine and paraspinal tissues, TMJD (temporomandibular joint dysfunction) and cerebral edema. He found appellant totally disabled for all work as of June 6, 1997.[3]

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[1] Appellant was separated from the employing establishment effective October 10, 1995 as she had abandoned her position, due to her absence without approved leave since August 9, 1995.

[2] Dr. James T. Snow, an attending psychologist, submitted a summary report of treatment from August 15 to December, 1995, and diagnosed depression and anxiety related to the February 9, 1995 accident. He released appellant to work as of December 1, 1995.

[3] A September 18, 1996 thoracic magnetic resonance imaging (MRI) scan was unremarkable.

In an October 9, 1996 report, Dr. Jaime G. Wancier, an attending Board-certified neurosurgeon, provided a history of injury and treatment and reviewed an October 7, 1996 MRI scan. He diagnosed a mild disc bulge at C3-4 not impinging on the spinal cord or thecal sac and a degenerated disc at L4-5 "with bulging of the annulus with no impinging on the central area of the spine, the thecal sac or nerve roots." Dr. Wancier recommended continued chiropractic manipulations by Dr. Tankersley, as appellant's "symptoms might be due to soft tissue injury…."[4]

In a November 22, 1996 report, Dr. Maurice Hanson, a Board-certified neurologist and second opinion physician, found no objective orthopedic or neurologic disability. He attributed appellant's muscle spasms and complaints of pain to "fibromyalgia or fibromyositis," related to "psychodynamic stress and emotional factors…."

In a January 6, 1997 report, Dr. Trumane Ropos, an attending rheumatologist, diagnosed a "local myofascial pain syndrome … precipitated by" the February 9, 1995 accident, which aggravated degenerative changes of the cervical, thoracic and lumbar spine.

In an April 2, 1997 report, Dr. Michael J. Ruddy, an orthopedic surgeon and second opinion physician, found no cervical or lumbar subluxations. He noted that, as he did not have appellant's complete medical records, "it would be impossible to ascertain how much of her symptoms are related to the accident of February 9, 1995 versus the accidents in 1986, 1992 and 1994." Dr. Ruddy limited appellant to lifting 20 pounds, noting that "it could not be ascertained at this time whether that is related to the 1995 accident or to her previous three accidents." He concluded that there were no objective orthopedic findings that would prevent appellant from performing full-time light or sedentary work.

In a July 30, 1997 report,[5] Dr. Wancier noted that an MRI scan performed that week showed bulging C3-4 and L4-5 discs, unchanged since previous studies, "mild degenerative disc disease with mild spondylosis." He noted "no significant spinal cord or nerve root compression," indicating that appellant was not a surgical candidate.

In an August 6, 1997 report, Dr. Wancier stated that there was no objective neurological pathology preventing appellant from performing light-duty work.

The Office found a conflict of medical opinion between Dr. Tankersley, for appellant, and Dr. Ruddy, for the government. To resolve this conflict, the Office referred appellant, the medical record and a statement of accepted facts to Dr. Michael J. Davoli, a Board-certified neurosurgeon.

In a September 18, 1997 report, Dr. Davoli opined that appellant no longer had residuals of the February 9, 1995 injuries. He explained that appellant had "significant prior injuries,"

[4] In a July 16, 1997 report, Dr. Wancier noted that appellant could not sit, stand or lay down for longer than one hour, due to "locking" in the left hip, lumbar pain and spasms.

[5] In a July 29, 1997 letter, the Office requested that Dr. Wancier review Drs. Hanson and Ruddy's reports and a statement of accepted facts. Dr. Wancier was requested to state whether he concurred with the findings of the second opinion physicians and whether appellant was medically able to perform light-duty work.

including C3-4 and L4-5 disc bulges, which had not significantly changed since the accident of February 9, 1995, documented on multiple objective studies. Dr. Davoli stated that appellant was "exactly where she would have been, had the accident not occurred." He found appellant fit for full duty, with no further treatments required. Dr. Davoli added that there were no objective findings to explain appellant's complaints and no spinal subluxations demonstrated by x-rays taken before and after the February 9, 1995 accident.

By notice dated October 8, 1997, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that her work-related disability had ceased, based on Dr. Davoli's opinion as impartial medical examiner. Appellant was afforded 30 days to submit additional evidence or argument.

Appellant submitted additional evidence from Dr. Tankersley. In treatment notes dated October 20 to November 17, 1997, Dr. Tankersley noted worsening pain symptoms and continued restricted motion throughout the spine. He diagnosed multiple spinal subluxations, permanent paresthesias of both hands, reflex sympathetic dystrophy of the right upper extremity and "sacro-iliac fusion." Dr. Tankersley also enclosed October and November 1997 chiropractic test results, including cerebrovascular scans and surface electromyography.

By decision dated November 10, 1997, the Office terminated appellant's compensation benefits on the grounds that she was no longer disabled due to the accepted February 9, 1995 injuries. The Office found that Dr. Tankersley's additional reports were insufficient to overcome Dr. Davoli's opinion as impartial medical examiner.

On December 1, 1997 appellant requested a hearing before a representative of the Office's Branch of Hearings and Review, which was held on July 29, 1998. At the hearing, Dr. Tankersley explained that he had diagnosed appellant with reflex sympathetic dystrophy syndrome using surface electromyography. Dr. Tankersley asserted that Drs. Davoli and Ruddy's evaluations were incomplete and incorrect according to chiropractic criteria for subluxations and vascular pathology.

In a July 8, 1998 report, Dr. Tankersley asserted that the series of MRI scans of record showed "changes in the cervical spine" and sacroiliac joint. He opined that the multiple injuries caused "increasing involvement…."[6]

By decision dated March 8, 1999 and finalized March 13, 1999, the Office hearing representative affirmed the November 10, 1997 decision. The hearing representative found that Dr. Davoli represented the weight of the medical evidence.

On May 24, 1999 appellant requested reconsideration. She asserted that she remained eligible for TMJ treatment. Appellant submitted a December 18, 1998 decision from the Social Security Administration, finding appellant disabled beginning June 19, 1997.

[6] Dr. Tankersley submitted a copy of his curriculum vitae and photocopies from medical literature not mentioning appellant's case.

By decision dated June 22, 1999, the Office denied reconsideration on the grounds that the evidence submitted was immaterial and, therefore, insufficient to warrant a merit review of its prior decision. The Office found that the findings the Social Security Administration were not dispositive regarding proceedings under the Federal Employees' Compensation Act. The Office further found that appellant remained eligible for TMJ treatment as the November 10, 1997 decision "did not show that this condition had resolved or … was no longer the result of the employment injury….."

In an August 25, 1999 report, Dr. James W. Medlock, an attending dentist, diagnosed bilateral displacement of the TMJ discs, "probable adhesive capsulitis bilaterally, with myalgia and dysfunction of the TMJ apparatus." He prescribed a reactive orthotic splint, injections, physical and chiropractic therapy. Dr. Medlock noted that appellant required a gold splint as she was severely allergic to the methylmethacrylate usually used.[7] The Office approved the splint and therapy recommended by Dr. Medlock.

On February 21, 2000 appellant requested reconsideration. She asserted that there was a conflict of opinion between Dr. Anthony Schiuma, an attending Board-certified orthopedic surgeon and Dr. Davoli. Appellant submitted additional evidence.

In a December 27, 1999 report, Dr. Schiuma noted appellant's history of low back pain since the February 1995 motor vehicle accident and the "three previous accidents prior to the accident in February 1995." On examination he found tenderness to lumbar palpation, positive straight leg raising tests bilaterally at 60 degrees and diagnosed a herniated L4-5 disc. Dr. Schiuma recommended new radiographic studies.

In a January 10, 2000 report, Dr. Schiuma noted that a January 4, 2000 MRI scan showed a mild central disc herniation at L4-5 with a central protrusion and foraminal stenosis on the right that "would certainly explain [appellant's] symptoms," including lumbar pain with right-sided radiculopathy.[8] He opined that appellant was a poor surgical candidate as the narrowing of the spinal canal was due in part to posterior osteophytic spurs at L4-5, in addition to the disc herniation. Dr. Schiuma recommended epidural steroid injections.

In a January 27, 200 report, Dr. Anthony M. Alberico, a Board-certified neurosurgeon, to which appellant was referred by Dr. Schiuma, noted the February 1995 accident and summarized appellant's treatment history. Dr. Alberico noted that the January 4, 2000 lumbar MRI scan was "essentially similar" to a 1997 MRI scan with a bulging L4-5 disc with some effacement of the thecal sac. He diagnosed "[c]hronic low back pain," and "bulging disc disease at L4-5." Dr. Alberico opined that appellant was not a surgical candidate as the disc bulge was not sufficiently large and recommended conservative care and medication.

[7] Dr. Medlock made substantially similar recommendations in an August 12, 1998 letter.

[8] A January 4, 2000 MRI scan reviewed by Dr. Richard Spira, a Board-certified radiologist, showed a herniated L4-5 disc with an annular tear, "right L4-5 moderate foraminal stenosis," "mild L3-4 central stenosis" and L4-5 and L5-S1 disc desiccation."

In a February 15, 2000 report, Dr. Schiuma commented that appellant was "having considerable pain. She has had multiple injuries and which one actually caused her herniated disc at L4-5 is impossible to say."

By decision dated March 23, 2000, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review of its March 13, 1999 decision. The Office found that the February 21, 2000 letter and the medical reports from Drs. Alberico, Medlock, Schiuma and Spira did not "contain a physician's opinion relating any condition to [her] employment" or "any legal argument which would require the Office to review its prior decision."

Regarding the first issue, the Board finds that the Office properly denied appellant's May 24, 1999 request for reconsideration.

Under section 8128(a) of the Act,[9] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[10] which provides that a claimant may obtain review of the merits of his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."[11]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[12]

In support of her May 24, 1999 request for reconsideration, appellant submitted a December 18, 1998 decision of the Social Security Administration, finding appellant disabled under criteria of the Social Security Act. However, an administrative law judge's decision that appellant was disabled under the Social Security Act has no evidentiary value in a case under the Act. The Board has held that entitlement to benefits under one Act does not establish entitlement to benefits under the Act. The SSA and the Act have different standards of medical proof on the question of disability. Under the Act, for a disability determination, appellant's injury must be shown to be causally related to an accepted injury or factors of his federal employment. Under

[9] 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b) (1999).

[11] 20 C.F.R. § 10.606(b).

[12] 20 C.F.R. § 10.608(b).

the SSA, conditions which are not work related may be considered in rendering a disability determination.[13]

Appellant's May 24, 1999 letter requesting reconsideration also correctly asserted that she remained entitled to treatment for TMJ disorder, which the Office noted in its June 22, 1999 decision. This letter did not raise other relevant legal argument and is thus not a sufficient predicate on which to reopen appellant's claim on the merits.

Therefore, the Office properly denied appellant's May 24, 1999 request for a merit review, as the evidence submitted in support thereof was irrelevant or immaterial and, therefore, insufficient to warrant reopening the case on the merits.

Regarding the second issue, the Board finds that the Office, in its March 23, 2000 decision, improperly denied appellant's request for further merit review.

The issue in this case is whether or not appellant had residuals of the accepted February 9, 1995 injuries on and after November 10, 1997, the date the Office terminated her compensation benefits. The Office based its termination on Dr. Davoli's September 18, 1997 opinion that the February 9, 1995 injuries had resolved. The Office accorded Dr. Davoli's opinion special weight, as he served as impartial medical examiner and is a Board-certified neurosurgeon.

Accompanying her February 21, 2000 request for reconsideration, appellant submitted reports from Dr. Schiuma, an attending Board-certified orthopedic surgeon, Dr. Alberico, an attending Board-certified neurosurgeon, and a January 24, 2000 lumbar MRI scan reviewed by Dr. Spira, a Board-certified radiologist. These reports constitute new evidence relevant to the issue in this case.

Dr. Schiuma submitted December 27, 1999, January 10 and February 15, 2000 reports addressing appellant's right-sided radiculopathy. He noted appellant's history of three motor vehicle accidents prior to February 9, 1995. Dr. Alberico, in his January 27, 2000 report, addressed appellant's L4-5 disc.

Appellant has submitted new, relevant evidence requiring a merit review by the Office. On remand of the case, the Office shall conduct a merit review of the reports of Drs. Alberico, Schiuma and Spira and issue an appropriate decision in the case.

[13] *Daniel Deparini*, 44 ECAB 657 (1993).

The decision of the Office of Workers' Compensation Programs dated March 23, 2000 is hereby set aside and the case remanded for further development consistent with this decision and order. The July 22, 1999 decision of the Office is affirmed.

Dated, Washington, DC
May 16, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member